Supreme Court, U.S.
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Nos. 01-1179 and 01-1187

In The

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

JULIO ABRAHAM, *et al.*,

Respondents.

NORCAL WASTE SYSTEMS, INC. and
NORCAL WASTE SYSTEMS, INC.
EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

Petitioners,

v.

JULIO ABRAHAM, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

Respondents submit this Counter-Statement of Questions Presented because the petitioner Bank of America (Docket No. 01-1179), and petitioners Norcal Waste Systems, Inc. and Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust (Docket No. 01-1187), have presented questions in their respective petitions which are not raised by the decision of the Court of Appeals for the Ninth Circuit. The only question fairly presented by the Court of Appeals' decision is this:

1. Did not the Court of Appeals correctly apply the jurisdictional rule of *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), in holding that neither prong of the ERISA complete preemption test was satisfied and removal was improper in light of its finding that respondent note holders' state law claims do not encroach upon any ERISA-regulated relationship, have nothing to do with ERISA benefits, the administration of a benefit plan or any duties imposed by ERISA and are not based upon any rights that are conferred, enforced or governed by ERISA, nor upon a violation of the terms of a plan?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

The parties to the proceedings are correctly set out in petitioners' papers. *See* Norcal Pet. at ii; Bank Pet. at ii-iii. Each of the respondents is an individual.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

COUNTER-STATEMENT OF THE CASE 3

A. Facts 4

B. Complaint And Proceedings 4

C. Court Of Appeals' Decision 5

1. Conflict Preemption 6

2. Displacement 9

REASONS FOR DENYING THE WRIT 10

A. The Holding That The Note Holders' Claims Fall Outside The Scope Of ERISA's Civil Enforcement Provisions Does Not Conflict With The Decision Of Any Other Court of Appeals And Is Entirely Correct 12

1. The Court Of Appeals' Holding That The Claims Fall Outside The Scope Of ERISA's Civil Enforcement Provisions Does Not Conflict With The Decision Of Any Other Court Of Appeals 14

TABLE OF CONTENTS – Continued

Page

2. Petitioners Distort The Court Of Appeals' Holding 16

B. The Holding That The Note Holders' Claims Are Not Conflict Preempted Does Not Conflict With The Decision Of Any Other Court of Appeals And Is Entirely Correct 18

1. The Court Of Appeals' Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals 19

2. Contrary To The Bank's Argument, The Court Did Not Hold That ESOPs Are Excluded From ERISA Coverage 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073 (7th Cir. 1992) 22

Buce v. Allianz Life Ins. Co., 247 F.3d 1133 (11th Cir. 2001) 26-27

Cal. Div. of Labor Standards v. Dillingham Standards, N.A., Inc., 519 U.S. 316 (1997) 7, 18, 19

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 18

Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270 (2d Cir. 1992) 21

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 7, 18, 20

Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust For Southern Cal., 463 U.S. 1 (1983) 12, 18

General American Life Ins. v. Castonguay, 984 F.2d 1518 (9th Cir. 1993) 19

Glazier & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec. Inc., 93 F.3d 1171 (3d Cir. 1996) 20, 21

Hospice of Metro Denver, Inc. v. Group Health Ins., 944 F.2d 752 (10th Cir. 1991) 20

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 16

Hull v. Fallon, 188 F.3d 939 (8th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000) 22

Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996) 22

Lordmann Enterprises, Inc. v. Equicor, Inc., 32 F.3d 1529 (11th Cir. 1994) 20

TABLE OF AUTHORITIES – Continued

Page

LoPresti v. Terwilliger, 126 F.3d 34 (2d Cir. 1997) ..21, 22

Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988) 19

Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992)..... 25

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 3, 5, 11, 12

Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995)..... 25-26

Moran v. Rush Prudential HMO, Inc., 230 F.3d 959 (7th Cir. 2000), *cert. granted*, 121 S. Ct. 2589 (2001) 26-27

N.Y. State Conf. of Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).....19, 20

Peacock v. Thomas, 516 U.S. 349 (1996)..... 14

Pegram v. Herdrich, 530 U.S. 211 (2000) 16, 20

Rutledge v. Seyfarth, Shaw, Fairweather, & Geraldson, 201 F.3d 1212 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000) 24

Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992)..... 22

Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999).....14-15, 20

Toumajian v. Frailey, 135 F.3d 648 (9th Cir. 1998)..... 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. § 1441(b) 1

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*..... 3

ERISA § 409(a), 29 U.S.C. § 1109(a) 2

ERISA § 502(a), 29 U.S.C. § 1132(a) ..... *passim*

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)..... 15

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) ..... *passim*

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) 9, 13, 15

ERISA § 514(a), 29 U.S.C. § 1144(a) 3, 6, 7, 12, 18

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, entered on September 7, 2001, and reported at 265 F.3d 811, appears in the Appendix of both petitioners' papers at pages 1a-20a.[1] The opinion of the district court is unreported. 21a-22a.

JURISDICTION

Respondents agree with the petitioners' statement of this Court's jurisdiction.

STATUTORY PROVISIONS INVOLVED

1. Section 1441(b) of Title 28 of the United States Code states in relevant part:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

[1] The defendants in this case filed two petitions (Docket No. 01-1179 and Docket No. 01-1187), seeking review of the same decision of the Court of Appeals for the Ninth Circuit. Respondent note holders Julio Abraham, *et al.* file this one opposition to both petitions. Respondents' citations are to the opinions of the Court of Appeals and the district court as reproduced in the appendices of both petitioners (which are identically numbered).

2. Section 502(a) of the Employee Retirement Income Security Act, ("ERISA"), 29 U.S.C. § 1132(a), states in relevant part:

> A civil action may be brought – . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

3. Section 409(a) of ERISA, 29 U.S.C. § 1109(a), incorporated by reference into § 502(a)(2), states in relevant part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

4. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), states in relevant part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

COUNTER-STATEMENT OF THE CASE

In *Abraham v. Norcal Waste Systems, Inc.*, 265 F.3d 811 (9th Cir. 2001), the United States Court of Appeals for the Ninth Circuit properly held that none of the state law claims in respondents' state court complaint was completely preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Based on both its reading of the respondents' state court complaint and well established principles of ERISA preemption jurisprudence, the Ninth Circuit held that the state law claims did not meet either of the two requirements for original federal question jurisdiction under *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 64-66 (1987): (1) respondents' claims did not fall within the scope of ERISA's civil enforcement scheme, § 502(a), 29 U.S.C. § 1132(a) ("displacement"), and (2) respondents' claims were not preempted by ERISA, § 514(a), 29 U.S.C. § 1144(a) ("conflict preemption").

A. Facts.

This case is about an agreement to sell stock and the breach of duties that arose from that agreement. Until 1986, petitioner Norcal Solid Waste Systems, Inc. ("Norcal"), was an employee-owned garbage company. In December 1986, respondents, one hundred and forty-seven former employee-shareholders (or their heirs and assigns) of Norcal (the "note holders"), sold their stock to petitioner Norcal Waste Systems, Inc. Empioyee Stock Ownership Plan and Trust ("Norcal ESOP" or "Norcal") as part of a leveraged buyout. In return, each respondent received cash and a note issued under a trust indenture agreement (the "Indenture") between the Norcal ESOP and Security Pacific National Bank, the predecessor of petitioner Bank of America ("Bank"), who acted as the Indenture Trustee. 3a.

Under the Indenture, Norcal's ESOP was required to redeem the notes before it could consolidate, merge, or substantially transfer assets. 4a (quoting Indenture § 10-2). However, in December 1987, Norcal completed a transaction with Envirocal, Inc., whereby the Norcal ESOP and the Envirocal ESOP combined to form a single entity without redeeming the notes and the Bank failed to enforce the note holders' redemption rights. 4a-5a.

B. Complaint And Proceedings.

In July 1994, the note holders filed this lawsuit in California state court against the Bank, Norcal, the Norcal ESOP, and fourteen other defendants. In their complaint, the note holders alleged only state law causes of action, including fraud, breach of contract, tortious interference

with contract, negligence, breach of fiduciary duty, and unjust enrichment. The complaint sought relief on the basis of the note holders' reliance in tendering their Norcal shares to the ESOP, the default on their notes, and the Bank's failure to enforce redemption of their notes at the time of the Envirocal transaction. 18a-19a.

Defendants removed, alleging that forty-four of the (one hundred and forty-seven) note holders were participants in the Norcal ESOP and three of their thirteen causes of action were completely preempted by ERISA. The district court denied the note holders' motion for remand, holding that there was federal subject matter jurisdiction as to the three claims of the forty-four note holders and exercising supplemental jurisdiction over all the other note holders and all the other claims. 21a-22a. The district court never addressed the determinative jurisdictional question whether the state law claims fell within the scope of ERISA's civil enforcement provision. 22a. After a partial settlement in 1995, resolving the note holders' claims against all defendants except the Bank, and after a trial, the note holders appealed to the Court of Appeals for the Ninth Circuit arguing, among other things, that the district court lacked subject matter jurisdiction.

C. Court Of Appeals' Decision.

The Court of Appeals vacated the judgment, holding that the district court lacked subject matter jurisdiction and therefore removal had been improper. Following *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), the Court of Appeals explained that removal would have

been proper only if: (1) ERISA preempted the state law cause of action under § 514(a), 29 U.S.C. § 1144(a) ("conflict preemption"); and (2) the cause of action was encompassed by ERISA's civil enforcement provision, § 502(a), 29 U.S.C. § 1132(a) ("displacement"). 9a. The Court held that neither requirement was met. *Id.* As the Court explained:

> Plaintiffs brought suit based on state law theories of fraud, breach of fiduciary duty, and negligence that cannot be said to "relate to" an ERISA plan within the meaning of 29 U.S.C. § 1144(a); nor are the claims encompassed within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). It is of no consequence that some Plaintiffs were also employees of the plan sponsor and plan participants at the time of suit because the claims have nothing to do with their status as such. Like all Plaintiffs, the ESOP participants brought suit in state court solely in their capacity as former shareholders and current note holders pursuant to the terms of the Indenture. Thus, the state law claims have no bearing on any ERISA-governed relationship and are not displaced by ERISA's civil enforcement scheme.

20a.

1. Conflict Preemption.

Applying the two prong complete preemption test, the Court first addressed conflict preemption under § 514. Noting that the "relevant state law certainly does not act immediately or exclusively on an ERISA plan," the Court explained that the question was whether the state laws claims have a "connection with" ERISA.

10a-11a. Discussing *California Division of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 324-25 (1997), and quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001), the Court explained that "to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood to survive, as well as the nature and effect of the state law on ERISA plans." 10a-11a. The Court then addressed in detail petitioners' arguments that § 514(a) preempted the state law claims because they allegedly infringed upon certain ERISA-regulated relationships between: (1) the plan and parties in interest; (2) the plan and participants; and (3) the plan and fiduciaries. 11a-17a. The Court found that none of these ERISA relationships was affected by the state law claims because the claims were based on the parties' non-ERISA relationships, that is the relationship of debtor – creditor and former shareholder, which have nothing to do with ERISA or the purposes of ERISA preemption. 9a-17a.

More specifically, the Court found the fact that forty-four of the one hundred and forty-seven note holders were participants in the ESOP was irrelevant to their state court claims because none of the note holders and none of their claims sought redress for any rights or obligations conferred by ERISA or challenged any conduct regulated by ERISA. 12a. The claims were not, the Court held, related to, let alone based on ERISA's rules prohibiting transactions between the plan and the parties in interest – the basis for the petitioners' argument that this ERISA-regulated relationship was somehow infringed by the claims. 12a. Rather, the Court found that, based on the

claims actually asserted in the state court action, "the ESOP's relationship with Plaintiffs who were also Norcal employees was no different from its relationship with the rest of the Plaintiff note holders." 13a.

Under similar reasoning, the Court of Appeals also found that the claims did not encroach upon the relationship between the plan and the participants. 13a-15a. Here again, the Court rejected the contention that the note holders' claims implicated ERISA or overlapped with the claims the participant note holders could make under ERISA. As the Court of Appeals emphasized, "[t]he claims of fraud, breach of fiduciary duty, and negligence arise from that status as note holders, and do not 'touch on' the status of the ESOP as a benefit plan or of any Plaintiffs as participants in that plan *(or on any claim the participants may make against the plan in that capacity)*." 13a-14a (emphasis added); *see also* 15a ("The rights and duties under state law between the ESOP and the note holders, whether ESOP participants or not, are distinct from any ERISA-governed relationship between a plan and its participants.").

Finally, the Court determined that the claims did not encroach upon the relationship between the plan and the plan's fiduciaries. Recognizing that "[p]laintiffs brought suit in their capacity as note holders pursuant to the terms of the Indenture, which by its own terms is governed by California law," the Court observed that "the state law claims here did not arise from transactions directly relating to plan benefits or administration." 16a. Rather, "[t]he conduct at issue concerned the acquisition of Norcal shares for restricted notes and a subsequent failure to redeem those notes." *Id.* "As such, the only

impact that the state law duties might have had on the plan or its beneficiaries is an indirect economic burden . . . insufficient for conflict preemption." *Id.* Additionally, the Court recognized that certain defendants – who were also plan fiduciaries – were not being sued for actions taken in that capacity, but were being sued "as the agents of the ESOP corporate entity that obtained Norcal shares from Plaintiff note holders." *Id.*

Based on its analysis that, in fact, the state law claims "have nothing to do with benefits, the administration of a benefit plan, or any duties imposed by ERISA" and that "[n]o ERISA-regulated relationship is encroached upon by the state law claims," the Court concluded that there was "no basis to find conflict preemption under ERISA." 17a.

2. Displacement.

Addressing complete preemption's second prong, § 502(a), ERISA's civil enforcement provision, the Court rejected the petitioners' argument that the note holders' claims fell within the scope of subsections (a)(2) or (a)(3), which permit suits to redress an ERISA violation or to enforce the terms of the plan or the provisions of ERISA. The Court explained:

> The claims asserted by all Plaintiffs in the state court action, however, do not fall within the scope of § 1132(a) because those claims are based upon rights that arise under state law in their capacity as former shareholders of Norcal and current note holders under the Indenture, *not upon any rights that are conferred, enforced, or*

governed by ERISA (nor upon a violation of the terms of a plan).

18a (emphasis added).

The Court's holding was based on the simple facts that the claims "seek relief for all plaintiffs on the basis of their reliance in tendering their Norcal shares to the ESOP, the eventual default on their notes and the failure to redeem or enforce redemption," and none of the "claims derive from 'any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter' " of ERISA. 19a (quoting § 409, 29 U.S.C. § 1109, which is incorporated into § 502(a)(2) by reference). Moreover, the Court explained, none of the plaintiffs "seek[s] relief as a participant, beneficiary, or fiduciary to enjoin any act or obtain any other equitable relief to redress any violations or enforce any provisions of ERISA." *Id.* (quoting *Toumajian v. Frailey*, 135 F.3d 648, 656 (9th Cir. 1998)). In finding that the claims also "do not concern any plan fiduciaries in their capacity as such," the Court concluded that "none of the state law claims can be characterized as fiduciary breach claims within the scope of ERISA's civil enforcement provision." *Id.*; *see also id.* ("Simply put, the claims do not concern any plan fiduciaries in their capacity as such."). Accordingly, the Court of Appeals held that claims did not fall within the scope of ERISA's civil enforcement provision.

REASONS FOR DENYING THE WRIT

The petitioners offer no "compelling reasons" for review and the petitions should be denied because the

decision of the Court of Appeals for the Ninth Circuit is based on the proper application of the well settled jurisdictional rule of *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), to the particular state law claims in this case. Petitioners' disagreement with the Court of Appeals' application of the rule and factual analysis of the claims does not merit review. And while petitioners attempt to identify alleged conflicts between the Court's decision and the decisions of five other Courts of Appeals – from the Second, Third, Sixth, Seventh, and Eighth Circuits – in fact, none of the cases identified by petitioners presents any actual conflict. At most, the petitioners do no more than complain, without merit, of "erroneous factual findings or the misapplication of a properly stated rule of law," reasons that rarely justify review. Sup. Ct. R. 10. This case is no exception and review should be denied.

Petitioners' "questions presented" and the asserted conflicts are false because they are premised on mischaracterizations of the Ninth Circuit Court of Appeals' decision and reasoning. Moreover, petitioners virtually ignore the determinative jurisdictional issue identified in *Metropolitan Life* – whether any of the note holders' state law claims are within the scope of ERISA's civil enforcement provisions. Lacking any substantial argument on this controlling issue, petitioners instead devote essentially all of their attention to the non-jurisdictional issue of conflict preemption which, as petitioners concede, cannot alone justify removal or create a proper basis for subject matter jurisdiction. *See* Norcal Pet. at 6-7; Bank Pet. at 3-4.

With no substantial argument on the key displacement issue and only illusory conflicts and mere disagreements with the Ninth Circuit Court of Appeals' application of *Metropolitan Life* to the particular facts presented to go on, the petitioners fail to present any valid reason for this Court to grant the writ.

A. The Holding That The Note Holders' Claims Fall Outside The Scope Of ERISA's Civil Enforcement Provisions Does Not Conflict With The Decision Of Any Other Court Of Appeals And Is Entirely Correct.

In *Metropolitan Life*, 481 U.S. at 64-66, this Court drew a distinction between claims that are preempted by ERISA § 514(a), 29 U.S.C. § 1144(a) ("conflict preemption"), and claims that fall within the scope of § 502(a), 29 U.S.C. § 1132(a) ("displacement"). "Conflict preemption" means that ERISA provides a federal defense, but does not establish original federal jurisdiction permitting removal. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust For Southern Cal.*, 463 U.S. 1, 25-27 (1983). Only when a claim also "falls within the scope" of § 502(a) is it converted from an "ordinary state common law complaint into one stating a federal complaint for the purposes of the well-pleaded complaint rule." *Metropolitan Life*, 481 U.S. at 65. Accordingly, the "displacement" prong of the complete preemption analysis is absolutely necessary for federal jurisdiction.

Guided by the statutory language and Ninth Circuit precedents (which petitioners do not challenge), the Court of Appeals correctly held that the note holders'

claims did not fall within the scope of § 502(a)(2) or (a)(3), the two civil enforcement provisions petitioners relied upon, because none was premised "upon any rights that are conferred, enforced, or governed by ERISA (nor upon any violation of a plan)." 18a.[2]

The Court's analysis is clearly correct. All the note holders, including the forty-four who also were ESOP participants, requested relief only for breaches of "rights that arise under state law in their capacity as former shareholders of Norcal and current note holders under the Indenture." 18a. The note holders sought relief solely on the basis of their reliance in tendering their Norcal shares to the ESOP, the default on the notes, and the failure to enforce redemption. 19a. The state court complaint did not state an ERISA cause of action, require any review of the terms of the ERISA plan or request ERISA relief, such as plan benefits or the clarification of future benefits under the plan. Moreover, none of the claims alleged any violation of duties imposed by ERISA on fiduciaries. Thus, the Court properly found that "none of the state law claims can be characterized as fiduciary

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[2] Petitioners do not dispute that the one hundred and forty-seven note holders each had exactly the same state court claims and that one hundred and three of the note holders (*i.e.*, those who were not ESOP participants) had no standing under ERISA and could not possibly bring a claim within the scope of ERISA's civil enforcement provisions. Petitioners fail to explain how some note holders' claims were indisputably not displaced while the exact same claims of other note holders were (under the petitioners' theory). The Court of Appeals' decision that none of the note holders' claims was completely preempted properly treats like claims alike.

breach claims within the scope of ERISA's civil enforcement provision." 19a. As the Court of Appeals aptly stated: "[s]imply put, the claims do not concern any plan fiduciaries in their capacity as such." *Id.* This holding was plainly correct. *See Peacock v. Thomas*, 516 U.S. 349, 353 (1996) (holding that subject matter jurisdiction did not exist because lawsuit did not allege a violation of ERISA or of the plan).

1. The Court Of Appeals' Holding That The Claims Fall Outside The Scope Of ERISA's Civil Enforcement Provisions Does Not Conflict With The Decision Of Any Other Court Of Appeals.

Not only is the Court of Appeals' decision correct but also, contrary to petitioners' arguments, it is fully consistent with the decisions of the other Courts of Appeals. In fact, the only case cited by petitioners (and even then, only by the Bank) as presenting any conflict, *Smith v. Provident Bank*, 170 F.3d 609, 612-14 (6th Cir. 1999), is factually inapposite and thus does not conflict with the Court of Appeals' decision. Indeed, *Smith* recognizes the rule, as does the Court of Appeals, that "the definition of a fiduciary under ERISA is a functional one." *Id.* at 613. However, as a factual matter the Court of Appeals for the Sixth Circuit in *Smith* found that, unlike this case, the plaintiff's claim was based on defendant's conduct as an ERISA fiduciary. Moreover, the plaintiff in *Smith* sought "recovery of [plan] benefits," leading the Court to conclude that the plaintiff, as a plan participant, sought "to clarify his rights to future benefits under the terms of the plan." *Id.* at 613-14. The plaintiff's claim in *Smith* to

recover benefits or clarify his future entitlement to plan benefits against a plan fiduciary based on breach of fiduciary duties imposed by ERISA clearly falls within the express scope of ERISA's civil enforcement provisions and distinguishes *Smith* from this case. *See* 29 U.S.C. § 1132(a)(1)(B) (providing action "to recover benefits due . . . under the terms of the plan"). Accordingly, the Court of Appeals' decision is not in conflict with *Smith*.[3]

For its part, Norcal fails to even develop a separate argument on the displacement issue. While Norcal admits that a claim can be brought under ERISA only "if it was within the scope of one of the civil enforcement provisions of Section 502," it limits its discussion of subsections 502(a)(2) and (a)(3) to a single footnote. *See* Norcal Pet. at 14 n.5. By so minimally discussing this key issue, Norcal essentially concedes that the Ninth Circuit's decision is not in conflict with a decision of any Court of Appeals.

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[3] In a misguided effort to manufacture a conflict on the displacement issue, the Bank lifts a single sentence quote from *Smith* ("[a] claim for breach of fiduciary duty against the fiduciary of an ERISA plan *necessarily* presents a federal question," Bank Pet. at 18 (quoting *Smith*, 170 F.3d at 614) (petitioner's emphasis)), implying that the Court of Appeals' decision is contrary to the law in the Sixth Circuit. When read in context, however, and given that the definition of an ERISA fiduciary is a functional one, it is clear that the quoted language in *Smith* means only that *if the ERISA fiduciary is acting as such* and its actions in that respect give rise to a claim by a person with standing to sue under ERISA, such claim falls within ERISA's civil enforcement provisions, § 502(a). Norcal's discussion of *Smith* recognizes this inherent limitation. *See* Norcal Pet. at 20.

Instead, as set forth below, Norcal takes an equally insupportable tack, arguing that the Court of Appeals' "dual capacity" analysis is flawed, while conceding elsewhere that this Court has recognized the very same rule, *i.e.*, "not all acts of a fiduciary who is for some purposes an ERISA fiduciary are fiduciary acts regulated by ERISA." Norcal Pet. at 13 (citing *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000)).

2. Petitioners Distort The Court Of Appeals' Holding.

Petitioners acknowledge the rule that a party may "wear two hats" and act in differing capacities that may expose them to regulation under either ERISA or state law depending on the nature of the act. *See* Norcal Pet. at 13 (citing *Pegram v. Herdrich*, 530 U.S. at 235 (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999) (holding that ERISA's fiduciary requirements do not apply to a plan settlor's decision on terms or structure of plan))). Petitioners' arguments boil down to the assertion that the Court of Appeals' decision improperly permits the note holders to have an "alternative theory of liability" under both ERISA and state law arising from the "same acts." *See* Norcal Pet. at 13-14; Bank Pet. at 15-16. Petitioners are wrong; the Court of Appeals' opinion says no such thing. As the Court clearly explains, the state court claims are not alternative theories of liability for violations of ERISA; to the contrary, the claims do not arise from the same acts that would give rise to liability under ERISA. As the Court stated:

> The claims of fraud, breach of fiduciary duty, and negligence arise from [plaintiffs'] status as note holders, and do not "touch on" the status of the ESOP as a benefit plan or of any Plaintiffs as participants in the plan *(or on any claim the participants may make against the plan in that capacity)*.

14a (emphasis added); *see also* 16a ("The conduct at issue concerned the acquisition of Norcal shares in exchange for restricted notes and a subsequent failure to redeem those notes.").

As the Court made perfectly clear, the note holders' state court claims had "nothing to do with benefits, the administration of a benefit plan, or any duties imposed by ERISA," 17a, or anything to do with the claims asserted in the separate federal suit brought by the forty-four ESOP participants. 12a-13a, 16a, 18a, 20a.

Having conceded that "ERISA allows a party to act as a fiduciary toward a plan's beneficiaries in some transactions and to act as a non-fiduciary, with divergent or even adverse interests, in others," Norcal Pet. at 13, Norcal's entire argument collapses and cannot be revived even by its repeated attempts to mischaracterize the Court of Appeals' factual analysis of the claims and actual holding.

Petitioners' reliance on the fact that forty-four of the note holders, in their distinct capacity as ESOP participants, also filed a separate action in federal court under ERISA is misplaced. Unless the claim actually asserted in the state court action is, in reality, a claim arising under federal law, mere standing of some of the note holders to

assert a federal claim does not create federal jurisdiction. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987).

Consistent with this Court's precedent, the Ninth Circuit properly found that none of the note holders, including those who also were ESOP participants, alleged any claims in this case arising under ERISA. The petitioners fail to present any basis to challenge the Ninth Circuit's holding. Without a question worthy of *certiorari* on this essential element of the complete preemption test, the petitions should be denied. *See Franchise Tax Bd.*, 463 U.S. at 7 (holding that removal was improper and therefore not reaching the merits of the ERISA conflict preemption issue).

B. The Holding That The Note Holders' Claims Are Not Conflict Preempted Does Not Conflict With The Decision Of Any Other Court Of Appeals And Is Entirely Correct.

Review of the petitioners' arguments and cases shows that the Court of Appeals' conflict preemption analysis under § 514(a), which followed this Court's analysis in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), and *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), is not in conflict with any other Circuit. 10a-11a. Instead, the only conflicts alleged by petitioners are illusory. They are premised either on their disagreement with the Court of Appeals' factual analysis of the state court claims or a mischaracterization of the Court's reasoning.

1. The Court Of Appeals' Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals.

Norcal contends that the Court of Appeals' decision conflicts with the decision in *General American Life Insurance Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993), a case that the Court considered and distinguished. 15a-17a; Norcal Pet. at 17-19. But this alleged conflict is merely a disagreement with the Court's factual analysis of the claims and the application of the well-settled rule of decision to these particular claims. In distinguishing *Castonguay*, the Court explained that the note holders' claims did not relate directly to plan benefits or plan administration, but created, at most, an indirect economic burden. 16a. *See also Cal. Div. of Labor Standards*, 519 U.S. at 334 (holding that "prevailing wage statute alters the incentives, but does not dictate the choices facing ERISA plans" and therefore is not preempted); *N.Y. State Conf. of Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (finding insufficient economic effect on administration for preemption).

In fact, *Castonguay* supports the decision in this case. As the Court explained, ERISA does not "regulate those relationships where a plan operates like any other commercial entity – for instance, the relationship between the plan as its own employees, *or the plan and its insurers or creditors.*" 13a (emphasis in original) (quoting *Castonguay*, 984 F.2d at 1521-22). *See also Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 832 (1988) (explaining that ERISA plans will be subject to suits under § 502 as well as a "second type of civil action . . . for run-of-the-mill state law claims such as unpaid rent, failure to pay

creditors . . . [that] are relatively commonplace."). Thus, it is well recognized that the relationship between the plan and a creditor may fall outside the scope of ERISA preemption. The petitioners have established no basis to question that conclusion here. *See Lordmann Enterprises, Inc. v. Equicor, Inc.*, 32 F.3d 1529, 1532-34 (11th Cir. 1994); *Hospice of Metro Denver, Inc. v. Group Health Ins.*, 944 F.2d 752, 754-56 (10th Cir. 1991).

In addition, neither *Smith v. Provident Bank, Inc.*, discussed above, nor *Glazier & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities Inc.*, 93 F.3d 1171, 1185 (3d Cir. 1996), stands for the petitioners' overly broad view that "when ERISA regulates a plan, it occupies the field of duties of care regarding the plan – fiduciary or other – and leaves no room for state law duties between the parties thereto." Norcal Pet. at 20. Petitioners' argument ignores this Court's decision in *Pegram* and would make ERISA the source of law for all possible claims between ESOP participants and their employer – which it clearly is not. *See Egelhoff*, 532 U.S. at 146 ("[W]e have recognized that the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy,' or else 'for all practical purposes preemption would never run its course.' ") (quoting *Travelers*, 514 U.S. at 655).

Petitioners' argument also ignores the material differences between the claims in *Smith* and *Glazier* and the note holders' claims here. *Smith* and *Glazier* addressed entirely different claims. As noted above, the plan participant in *Smith* asserted a claim against an ERISA fiduciary for plan benefits arising from the mismanagement of the participant's plan assets. *See Smith*, 170 F.3d at 612-14.

The Court of Appeals' opinion in *Glazier*, which does not even address complete preemption, offers even less support for petitioners' argument. Unlike this case, the action in *Glazier* was brought by an ERISA plan to recover the loss of plan assets against a party alleged to have acted as an ERISA fiduciary in causing the loss. The Third Circuit reversed the district court's decision that the state law claims were conflict preempted under ERISA and remanded for the district court to determine whether the defendant was acting as an ERISA fiduciary when it allegedly caused the loss. *See Glazier*, 93 F.3d at 1182. This in no way conflicts with the Court's conclusion here that the note holders' claims exist "irrespective of the status of any of the Defendants as fiduciaries of an ERISA plan," and "do not concern any plan fiduciaries in their capacity as such." 19a.

The petitioners' other cases are similarly inapposite and overstated. The Bank cites to two cases from the Second Circuit for the unremarkable and inapposite proposition that "alternative state law theories for conduct actionable under ERISA" are preempted. *See* Bank Pet. at 16 (citing *LoPresti v. Terwilliger*, 126 F.3d 34, 41 (2d Cir. 1997) ("This common law conversion claim to recover losses to the Funds is nothing more than an alternative theory of recovery for conduct actionable under ERISA and as such is preempted by ERISA.") (internal quotations omitted), and *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 288 (2d Cir. 1992) (alleging failure to fund the plan according to plan's terms)). The Bank also erroneously suggests a parallel between *LoPresti* and this case by miscasting the Court's opinion, which affirmatively rejected the view that the claims in this case

involved plan assets in the manner meant by *LoPresti*, a suit alleging that the defendants converted funds that belonged to the plan. *See LoPresti*, 126 F.3d at 37; Bank Pet. at 16.

Norcal cites two cases that involved suits against plan administrators for the denial of benefits for the proposition that claims cannot be stated on "parallel state law relationships," Norcal Pet. at 23-24 (citing *Hull v. Fallon*, 188 F.3d 939, 943 (8th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000), and *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996)), and two employment cases for the view that suits cannot be maintained on the basis of "dual capacities," Norcal Pet. at 22-23, 23 n.12 (citing *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 8 (2d Cir. 1992), and *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073 (7th Cir. 1992)).[4] However, as with *LoPresti* and *Diduck*, the courts' analysis in each case was premised on the conclusion that the claim was, in fact, a claim for benefits under ERISA and therefore the courts found the state law claim preempted on that basis. *See Hull*, 188 F.3d at 943 ("In short, although Hull's characterization of his claims sound in medical malpractice, the essence of his claim rests on the denial of benefits."); *Dunham-Bush, Inc.*, 959 F.2d at 12 ("Ultimately, Smith is no different from any other plan participant suing for added benefits under a

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[4] Norcal also argues that *Dunham-Bush, Inc.* and *Bartholet* are relevant because they establish that ERISA can preempt contract claims arising from contracts that predate the ERISA relationship. *See* Norcal Pet. at 22-23, 23 n.12. However, the Court of Appeals' decision here did not turn on the order in which the ESOP was created and the Indenture agreement signed, which makes Norcal's argument superfluous.

claim that the employer promised additional monies to the participant."). These cases, therefore, do not stand for the legal rule that all state law claims between possible ERISA parties must be preempted, or completely pre-empted, as petitioners suggest. They are not in conflict with the rule applied by the Court of Appeals in this case in light of the Court's determination that the state law claims were legally and factually distinct from any claims that could be brought under ERISA.

2. Contrary To The Bank's Argument, The Court Did Not Hold That ESOPs Are Excluded From ERISA Coverage.

In an effort to create a conflict, the Bank mischaracterizes the Court of Appeals' opinion. Contrary to the Bank's assertion, the Court of Appeals' decision is not tantamount to a rule that all transactions subject to ERISA's statutory exemptions are necessarily or for all purposes "outside of the scope of ERISA." Bank Pet. at 14.

Additionally, the Court's decision – that none of the alleged ERISA-regulated relationships was infringed by the claims – a conclusion the Court reached based on its factual analysis of the note holders' complaint – was not, as the Bank alleges, "grounded" merely on the fact that the transaction giving rise to the issuance of the notes by the ESOP was an "exempt" transaction. Bank Pet. at 13. In fact, the Court discussed the exemption from the prohibited transaction rules in one part of its conflict

preemption analysis, which addressed one of the three ERISA-regulated relationships that petitioners argued were infringed by the claims. The Court explained:

> [T]he state law claims alleged in the initial complaint did not implicate the prohibited transaction provision, which serves ERISA's purposes by protecting a plan's participants and beneficiaries from a depletion of plan assets through shady, inside deals. Indeed, the claims do not remotely concern the objectives of ERISA.

12a (citations and quotations omitted).

For this reason, the Court of Appeals concluded that the status of some note holders as "parties in interest" was irrelevant to their claims as note holders. 12a-13a. The fact that the claims were based on notes issued in a transaction that was exempt from ERISA's prohibited transaction provision only added additional support for the Court's conclusion that the note holders' claims did not improperly infringe upon any ERISA-regulated relationship.

Indeed, the Court of Appeals contrasted this case with its decision in *Rutledge v. Seyfarth, Shaw, Fairweather, & Geraldson*, 201 F.3d 1212, 1222 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000), where, unlike this case, the claims were premised on an ERISA-regulated relationship between the plan and a party in interest "in the very respects governed by ERISA's regulation of prohibited transactions." 12a. The difference, as noted by the Court of Appeals, is that the note holders' claims in this case "do not remotely concern the objectives of ERISA," and as a result, "do not bear upon any ERISA-governed relationship." *Id.* The Court of

Appeals' factual analysis of the note holders' claims and the decision that *those claims* are not preempted cannot support the Bank's characterization of the decision as promulgating a rule that "*transactions* subject to ERISA's statutory exemptions are outside the scope of ERISA." Bank Pet. at 14 (emphasis added).

Moreover, even allowing for the Bank's shading of the Court of Appeals' decision, the cases relied upon by the Bank to demonstrate an alleged conflict do not support its argument. In fact, in *Martin v. Feilen*, 965 F.2d 660 (8th Cir. 1992), the Court of Appeals for the Eighth Circuit rejected the "sweeping approach" to ERISA preemption that the petitioners rely on here. *See Feilen*, 965 F.2d at 665-66. Like the Court of Appeals' factual analysis of the note holders' claims, the Court in *Feilen* explained that a specific analysis of the challenged transactions was necessary in order to determine whether they "sufficiently involved the ESOP to implicate ERISA fiduciary duties." *Id.* at 665. Moreover, *Feilen* is consistent with the Court of Appeals' analysis in recognizing that ESOP fiduciaries are "not subject to ERISA's fiduciary duty requirements [for actions] made in their capacity as corporate officers, not as plan administrators." *Id.* at 666. Clearly, there is no conflict with *Feilen*.

The Bank's other case, *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), is similarly unrelated and also does not conflict with the Court of Appeals' decision. In *Moench*, the Court of Appeals for the Third Circuit held that ERISA fiduciaries could be liable for failing to diversify ESOP plan assets even though ESOPs are permitted to hold non-diversified portfolios. *See Moench*, 62 F.3d at 569-70. *Moench*, therefore, stands for the proposition, not

relevant here, that when the suit involves a violation of ERISA's fiduciary duties, an exemption may not provide a complete merits defense. More telling, however, is the Third Circuit's agreement in *Moench* with the principle, relied on by the Court of Appeals in this case, that fiduciary status is not an "all or nothing" concept. *Id.* at 561. In particular, *Moench* noted the rule, followed by the Court of Appeals here that, "[a] court must ask whether a person is a fiduciary with respect to the particular activity in question." *Id.* In this case, the note holders' complaint did not allege violations of ERISA fiduciary duties, or any other right created by ERISA. The Court of Appeals, therefore, correctly rejected petitioners' argument that the note holders' claims were preempted merely because the notes were issued in an exempt transaction. Instead, the Court analyzed the note holders' claims and found that they did not involve the ESOP fiduciaries in their capacity as such. 16a. Neither *Moench* nor *Feilen* is to the contrary.

* * *

As a last ditch argument, the Bank suggests that a writ of *certiorari* "may" be appropriate in light of *Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959 (7th Cir. 2000), *cert. granted*, 121 S. Ct. 2589 (2001), because "the Seventh Circuit held that the case was properly removed even though the claim was not *preempted* by ERISA." Bank Pet. at 19 (emphasis added).[5] *Moran* has no application to this

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[5] In this discussion, the Bank also cites *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133 (11th Cir. 2001). However, *Buce* did not hold that ERISA permitted removal of a case that was not preempted by ERISA. Rather, the question in *Buce* was whether

case as it involved a state law arguably falling within the insurance exception to ERISA preemption. In any event, the Bank's argument only serves to undermine petitioners' position by focusing the jurisdictional inquiry on the issue of displacement. If this Court were to adopt a rule of complete preemption that eliminated the element of conflict preemption, the decision in this case would be the same. As has been established, the claims in this case neither fall within the scope of an ERISA provision that the note holders can enforce via § 502(a), nor require an interpretation of a contract governed by federal law as the Seventh Circuit's test requires. *See Moran*, 230 F.3d at 967.

CONCLUSION

The petition of Bank of America and the petition of Norcal Waste Systems, Inc. and Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust fail to present any issue worthy of review. Petitioners' arguments come from their disagreement with the Ninth Circuit Court of Appeals' analysis of the removed complaint and mischaracterizations of the Court's opinion. The Court of Appeals' decision is correct and does not conflict

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the Court could look to state law to interpret the terms of an ERISA-governed insurance plan when the insurance policy included a choice of law provision. *See Buce*, 247 F.3d at 1148; *see id.* at 1150 (Barkett, J., concurring) ("The question before this Court is whether ERISA precludes the parties to an agreement from using state law to define an ERISA contract's terms. In the absence of any compelling rationale to the contrary, I am not persuaded that ERISA sweeps so broadly.").

with the decision of any other Circuit. Accordingly, the petitions should be denied.

Respectfully,

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